

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. ) FINAL ORDER  
20,683-s76H BY LARRY CAMPBELL )  
\*\*\*\*\*

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on March 15, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Order.

Exceptions to the Proposal for Decision were filed by the Applicant, Larry Campbell, with the Hearing Examiner. Those exceptions are addressed below:

EXCEPTIONS TO PROPOSED ORDER AND RESPONSES TO EXCEPTIONS:

1. Exception: The Applicant requests any amount of water for any period of time.

Response: The Proposed Order and Final Order must be based on the hearing record. At the hearing the Applicant stated that water was useful only if available for the entire period requested, which is from May 1 to September 30, inclusive, of each year. The Proposed Order cannot be altered by a change of testimony submitted after the record is closed.

2. Exception: The Applicant, the Objectors' witness and the Department Hydrologist all stated and were not challenged by anyone at the hearing that water on the surface on the Applicant's property becomes groundwater and thus not part of the source of supply.

Response: Only the Applicant made such a statement at the hearing, and this statement was challenged by the Objectors. The Objectors' witness did state that waters in the source of supply go underground, but that they then surface again. The Department's Hydrologist stated

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1 that Rye Creek is a gaining stream late in the season and a losing  
stream early in the season.

3 3. Exception: That the use of water for eating and drinking is  
4 beneficial.

5 Response: The Application was for irrigation purposes only,  
6 not domestic. Further, the Applicant testified that the water would be  
7 used for a garden. Garden crops require water throughout the irrigation  
8 season not just for a couple of months in the spring.

9 4. Exception: That the water could be used in January in a greenhouse.

10 Response: The Application is for May 1 to September 30 only.  
11 The period of appropriation cannot be extended without going through  
12 another public notice.

13 FINAL ORDER

15 Application for Beneficial Water Use Permit No. 20,683-s76H by  
16 Larry Campbell is hereby denied.

17 NOTICE

18 The Hearing Examiner's Final Order may be appealed in accordance  
19 with the Montana Administrative Procedures Act by filing a petition in  
20 the appropriate court within thirty (30) days after service of the Final  
21 Order.

23 DATED this 15th day of April, 1980.

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David L. Pengelly  
DAVID L. PENGELLY, D.N.R. & C.  
HEARING EXAMINER

CASE # 20683

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2 OF  
3 NATURAL RESOURCES AND CONSERVATION  
4 OF THE STATE OF MONTANA

5 \* \* \* \* \*  
6 IN THE MATTER OF APPLICATION FOR )  
7 BENEFICIAL WATER USE PERMIT NO. ) PROPOSAL FOR DECISION  
8 20,683-s76H BY LARRY CAMPBELL )  
9 \* \* \* \* \*

10 Pursuant to the Montana Water Use Act and the Montana Administrative  
11 Procedures Act, after due notice, a hearing was held on December 18,  
12 1979, in the Courtroom of the Ravalli County Courthouse, Hamilton,  
13 Montana, for the purpose of hearing objections to the above-named Application  
14 for Beneficial Water Use Permit No. 20,683-s76H, David Pengelly, Hearing  
15 Examiner, presiding.

16 The Applicant, Larry Campbell, appeared at the hearing and presented  
17 testimony in support of the Application. Mr. Campbell was not represented  
18 by legal counsel. No exhibits were introduced supporting the Application.

19 Two Objectors attended the hearing and presented testimony or  
20 statements. The Objectors, Bob Recht and Roger Conner, were not represented  
21 by legal counsel. Bob Recht introduced one (1) exhibit supporting his  
22 objection, to wit:

23 OBJECTOR'S EXHIBIT:

24 O-1 Summary of Rye Creek Decree, Case No. 6281, August 1, 1935

25 The Objector's Exhibit was marked accordingly and received into the  
26 record without objections. Also present and testifying on behalf of the  
27 Objectors was Fred Thorning.

28 Montana Department of Natural Resources and Conservation personnel  
present and testifying on behalf of the Department were Larry Brown,

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1 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,  
2 Missoula Water Rights Bureau Field Office Manager. Also present  
3 was Vicki Woodorw, Hearing Recorder. The Department was not represented  
4 by legal counsel. No exhibits were introduced by the Department.  
5

6 SUMMARY OF RECORD

7 1. On September 19, 1978, the Department received an Application  
8 for Beneficial Water Use Permit No. 20,683-s76H by Larry Campbell to  
9 appropriate 30 gallons per minute of water, not to exceed 12.5 acre-foot  
10 per annum from an unnamed tributary of Rye Creek, a tributary of the  
11 Bitterroot River in Ravalli County, Montana. The water is to be diverted  
12 from said unnamed tributary by means of a ditch at a point in the NW1/4  
13 NE1/4 NE1/4 of Section 33, Township 3 North, Range 20 West, M.P.M., and  
14 used for new irrigation on a total of 5 acres, more or less, in the NE1/4  
15 of said Section 33, from May 1 to September 30, inclusive, of each year.

16 2. On January 10, 17 and 24, 1979, the Department caused to be  
17 duly published in the Ravalli Daily Republic, Hamilton, Montana, notice  
18 of the above Application for Beneficial Water Use Permit No. 20,683-  
19 s76H.

20 3. On January 24, 1979, the Department received an objection to the  
21 above Application from the Montana Power Company.

22 4. On February 16, 1979, the Department received an objection to  
23 the above Application from Roger B. Conner.

24 5. On March 5, 1979, the Department received an untimely objection  
25 to the above Application from Robert F. Recht.

26 6. At the Pre-hearing Conference held on December 12, 1979, it was  
27 agreed by all parties that said unnamed tributary to Rye Creek would be  
28 referred to as Cottonwood Creek.

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1           7. The Applicant, Larry Campbell, testified that he believes water  
2 from Cottonwood Creek is available for appropriation on his property,  
3 even though Rye Creek may be dry further downstream. The Applicant stated  
4 that he believes water in the source of supply flows on the surface in  
5 the vicinity of his property and then goes underground and becomes un-  
6 available for downstream users; therefore, the Applicant believes that his  
7 appropriation of water could not adversely affect downstream users since  
8 the water would not be available for their use whether he takes it or not.  
9 Under cross-examination, the Applicant stated that he did not expect there  
10 would be much, if any, return flow to the source of supply from his  
11 irrigated lands if this permit were granted. The Applicant feels that he  
12 would only be applying enough water to meet the crop requirements and  
13 therefore there would be little, if any, return flow to the source of  
14 supply. The Applicant further stated that the flow in Cottonwood Creek  
15 is fairly steady during the year, based on personal observation over the  
16 past three (3) years. The Applicant did state that Cottonwood Creek has  
17 dried up in August.

18           8. The Objector, Bob Recht, stated that he believes surface water  
19 and ground water along Rye Creek are interconnected; if the Applicant  
20 removed surface water from the source of supply then, further downstream  
21 surface water would have to go underground to maintain the equilibrium  
22 between the surface water and ground water, thus leaving less surface  
23 water downstream for use by prior appropriators. Mr. Recht stated that  
24 he has lived on Rye Creek since 1975, and during that period of time has  
25 had to adjust his irrigation program during periods of water shortages,  
26 which occur fairly often. Mr. Recht uses a traveling-gun sprinkler  
27 system with a capacity of 450 gallons per minute. Every year he has to  
28 either shut the system off or nozzle it down. At a diversion rate of

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1 300 gallons per minute there are times when the Objector, Mr. Recht, is  
2 able to completely dry up Rye Creek. There are 632 miner's inches of  
3 decreed water listed on Rye Creek (Exhibit O-1) and the Objector does  
4 not feel that this volume of water is available except during high water  
5 in the spring. Mr. Recht has decreed rights for 292 miner's inches on  
6 Rye Creek and currently is using 165 miner's inches on Rye Creek. Mr. Recht  
7 questioned whether it is feasible to flood irrigate 5 acres of decomposed  
8 granite with 30 gallons per minute. Mr. Recht also stated that he has  
9 often observed Cottonwood Creek dry during the summer.

10 9. Fred Thorning, an observer, testified that he has lived and  
11 watched Rye Creek for 50 to 60 years and during that period has only  
12 observed approximately 5 years when there was sufficient water for flood  
13 irrigating of lands along Rye Creek. Mr. Thorning also testified that  
14 the high water period on Rye Creek generally lasts up to June, and  
15 usually drops off quite rapidly. Mr. Thorning does not feel that there  
16 are any unappropriated waters in the source of supply except during high  
17 water in the spring.

18 10. Roger Conner, an Objector, testified that he was born and  
19 raised on the ranch he currently owns. Mr. Conner testified that  
20 during this period they've always had short water periods, and that the  
21 availability of water for Mr. Conner is dependent upon upstream users.  
22 Mr. Conner has the last point of diversion on Rye Creek. Mr. Conner feels  
23 that even small diversions upstream would adversely affect his prior right.  
24 Mr. Conner testified that occasionally during the late part of the irrigation  
25 season excess water does pass his point of diversion, but quite often  
26 this is because somebody up above him on Rye Creek has made a change in  
27 their irrigation system and allows an excess of water to run down the creek.  
28 Mr. Conner irrigates approximately 100 acres with Rye Creek water. He can

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1 divert the entire flow of Rye Creek and does so quite often during the  
2 irrigation season.

3 11. Larry Brown, Department Hydrologist, testified that Cottonwood  
4 Creek produces from 0.5 to 3 acre-feet per annum. Mr. Brown stated that  
5 Cottonwood Creek would be lucky to produce 10 gallons per minute. Mr. Brown  
6 further testified that once Rye Creek leaves the mountains and spreads  
7 out into the Bitterroot Valley it gets into the Bitterroot River alluvium  
8 which has much larger pore spaces than the under ground material upstream  
9 and that it takes a lot of water to fill these pore spaces. Mr. Brown  
10 testified that Rye Creek is a gaining stream late in the season and a  
11 losing stream during the spring runoff period.

12 12. Jan Mack, Missoula Water Rights Bureau Field Office Manager,  
13 testified that on September 25, 1979, Rye Creek was running into the  
14 Bitterroot River with Roger Conner's diversion ditch filled to capacity.

15 13. Bob Recht stated that it was probably not practical to give  
16 the Applicant a water right from the period of April 1 to May 30 since  
17 the Applicant would really need the water later in the summer once he  
18 got a crop planted. The Applicant, Larry Campbell, stated that the  
19 water would not be useful to him unless he could obtain a permit to use  
20 the water during the entire period for which he has applied for water.

21  
22 PROPOSED FINDINGS OF FACT

23 1. That there are no unappropriated waters in the source of supply  
24 after the spring runoff.

25 2. That the appropriation of Cottonwood Creek waters by the  
26 Applicant would adversely affect prior appropriators on Rye Creek.

27 3. That the Applicant cannot beneficially use the water if a  
28 Provisional Permit is granted for less than the period requested.



1           4. That the proposed use is a beneficial use.

2           5. That the proposed means of diversion or construction are adequate  
3 and the proposed use will not interfere with other planned uses or  
4 developments for which a permit has been issued or for which water has  
5 been reserved.

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7                           PROPOSED CONCLUSIONS OF LAW

8           1. Section 85-2-311, MCA, 1979, states that "The department shall  
9 issue a permit if:

- 10               1. there are unappropriated waters in the source of supply:  
11                   a. at times when the water can be put to the use  
12                       proposed by the applicant;  
13                   b. in the amount the applicant seeks to appropriate; and  
14                   c. throughout the period during which the applicant  
15                       seeks to appropriate, the amount requested is available;  
16           2. the rights of a prior appropriator will not be adversely  
17               affected;  
18           3. the proposed means of diversion or construction are adequate;  
19           4. the proposed use of water is a beneficial use;  
20           5. the proposed use will not interfere unreasonably with  
21               other planned uses or developments for which a permit has  
22               been issued or for which water has been reserved; . . ."

23           2. Based on the testimony presented at the hearing and information  
24 available in the Department's file on this matter, it is concluded that  
25 there are no unappropriated waters in the source of supply in the amount  
26 requested throughout the period during which the Applicant seeks to  
27 appropriate.

28           3. Based upon testimony presented at the hearing and information

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1 in the Department's file on this matter, it is concluded that the rights  
2 of prior appropriators would be adversely affected if this permit were  
3 granted.

4 4. Based upon testimony presented at the hearing and information  
5 present in the Department's file on this matter, it is concluded that  
6 the proposed means of diversion or construction are adequate; the proposed  
7 use of water is a beneficial use; and the proposed use will not interfere  
8 unreasonably with other planned uses or developments for which a permit  
9 has been issued or for which water has been reserved.

10 Based on the above Proposed Conclusions of Law, the following  
11 Proposed Order is hereby made:

12  
13 PROPOSED ORDER

14 1. Application for Beneficial Water Use Permit No. 20,683-s76H by  
15 Larry Campbell is hereby denied.

16  
17 NOTICE

18 This Proposed Order is offered for the review and comment of all  
19 parties of record. The review and comment period shall commence with  
20 the mailing of this Proposed Order and shall end fifteen (15) days  
21 thereafter. No extensions of time for comment shall be granted.


22 The Final Order in this matter shall be sent to all parties by  
23 certified mail.

24 The Hearing Examiner's Final Order may be appealed in accordance  
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26  
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1 with the Montana Administrative Procedures Act by filing a petition in  
2 the appropriate court within thirty (30) days after service of the Final  
3 Order.

4  
5 DATED this 15th day of March, 1980.

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8 DAVID L. PENGELLY, D.N.R.&C.  
9 HEARING EXAMINER

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